United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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United States Court of Appeals
FOR THE SECOND CIRCUIT

STANLEY V. TUCKER,

Plaintiff-Appellant,

v.

MECHANICS SAVINGS BANK, GEORGE M. GILMAN, JR., ALBERT J. MARKS, JR., d/b/a GILMAN & MARKS, and THOMAS A. BAILEY,

Defendants-Appellees.

BRIEF OF APPELLEES GEORGE M. GILMAN, JR., ALBERT J. MARKS, JR., d/b/a GILMAN & MARKS, AND THOMAS A. BAILEY

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BRIEF OF APPELLEES GEORGE M. GILMAN, JR., ALBERT J. MARKS, JR., d/b/a GILMAN & MARKS, AND THOMAS A. BAILEY

I. Issue

Whether the anti-trust claims made by the appellant are barred by the respective Federal and State statutes of limitations, 15 U.S.C. 15b and Connecticut General Statutes 35-40.

II. Statement of the Case

On January 24, 1969 Gilman and Marks received a memorandum from Mechanics Savings Bank.[1] (Exhibit A of Summary Judgment Motion). The memorandum incorporated a mortgage confirmation letter to Mr. Tucker with provision and terms attached thereto.

As counsel for Mechanics Savings Bank, Gilman and Marks performed a title search on the property located at 53 Hamilton Street and prepared the papers necessary to consummate the mortgage loan to Mr. Tucker.

The title search was performed prior to the execution of the mortgage papers. The mortgage papers were signed on May 16, 1969 (Exhibit B of Summary Judgment Motion). On May 20, 1969 Gilman and Marks were paid for the title search, legal services performed in the consummation of this mortgage loan transaction, and other closing costs (see Exhibit C, paragraphs 6 and 7 of Summary Judgment Motion).

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[1] Despite the fact that plaintiff Tucker designated in his Index to Record on appeal that co-defendant's Brief In Opposition to Plaintiff's Motion for Summary Judgment would include attached Exhibits (Document 25), no exhibits are attached. Rather than further clog the record, this defendant will allude directly to those Exhibits as appended to its Summary Judgment Motion which is part of the record as allowed by Rule of Appellate Procedure 30 (b).

The release of $12,800 was withheld by Mechanics Savings Bank on the legal advice of Gilman and Marks on the basis that the plaintiff had not met his obligations pursuant to the mortgage deed and note. The final date for the release of these monies per the mortgage deed and note was June 15, 1970 (see Exhibit B of Summary Judgment Motion). The same legal opinion was rendered on or shortly before June 15, 1970.

The only contact defendants had with this particular loan transaction was sometime in the Fall of 1970, at which time Mechanics Savings Bank inquired what had to be done at that point to effectuate the release of the final funds.

Other than that single occasion, no one in Gilman and Marks has had any contact whatsoever with this mortgage loan (Exhibit C, paragraph 11 of Summary Judgment Motion).

On November 23, 1976 Judge M. Joseph Blumenfeld granted co-defendant's cross Motion for Summary Judgment on the statute of limitations defense. From that decision plaintiff appeals.

III. Argument

A. Issues not cognizable or raised on this appeal.

1. Despite the fact that the plaintiff spends some time in his Brief arguing the *merits* of his anti-trust actions (Section I-A-2 of his Brief), the only issue for review is whether, based on the facts as presented in the District Court Brief, the statute of limitations had run pursuant to the respective Federal and State statutes (15 U.S.C. 15b and Connecticut General Statutes 35-40).

2. Plaintiff also is not appealing denial of his Motion for Summary Judgment which became moot after the finding for the defendants on the statute of limitation issue.

B. The plaintiff's claims are barred by 15 U.S.C. 15b and Connecticut General Statutes 35-40.

The United States Supreme Court has stated that for purposes of 15 U.S.C. Sec. 15b, "Generally a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corporation* v. *Hazeltine Research,* 401 U.S. 321, 328, 91 S.Ct. 795, 28 L. Ed. 2d 77 (1971). The "right of action for civil conspiracy under the anti-trust law accrues from the commission of the last overt act causing injury or damage". *Peto* v. *Madison Square Garden Corporation,* 384 F2d 683 (CA 2 1967); See *Akron Presform Mold Company* v. *McNeil Corporation,* 496 F2d 230, 234 (CA 6 1974).

As pointed out in *Zenith,* supra, at pp. 338-339 in the case of a *continuing* conspiracy to violate the anti-trust laws, a cause of action will accrue for "speculative damages" when said damages are suffered.

However, where a violative act is *complete in itself,* the statute is not tolled simply because the effects of a *particular* act may continue to be felt. Where the violation is final at its impact, for example,

> . . . where an actionable wrong is by its very nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitation period and upon the initial act.

Poster Exchange, Inc. v. *National Screen Service Corporation,* 517 F2d 117, 126-127 (CA 5 1975), cert. denied 425 U.S. 917 (1977). The *Poster* court goes on to state at page 128.

> It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act *actually* occurring during the limitation period, not merely the abatable but unabatable *internal* consequences of *some prelimitations action* (Emphasis supplied).

The Fifth Circuit elaborates further on these caveats to *Zenith* in *Imperial Point Colonnades Condominium* v. *Mangurian,* 549 F2d 1029 (CA 5 1977). In *Imperial* defendant Mangurian was the owner of co-defendant Drexel Properties which was the developer of the condominium project called Imperial Point. Mangurian was also the owner of recreational land adjacent to the Imperial Point Condominiums which was leased to Drexel Properties. When an individual purchased a condominium, he had to agree, as a condition precedent to ownership, to accept a pro rata assignment of the lease and a pro rata obligation to assume rental payments. Members of the condominium brought suit charging that an illegal tying arrangement existed.

The court enters an extended analysis of tying product cases and holds that the statute of limitation has not elapsed because collection of rents pursuant to the lease (the "tied product") are the "damages" suffered by the plaintiff. Such rentals were the *benefits* sought from the tying arrangement. Each rental payment is a new accruing act. *Ibid.* at page 1043. The object sought was the establishment of a "continuing relationship" with the plaintiff. See *Baker* v. *F&F Investment,* 410 F2d 1191, 1200 (CA 7) cert. denied 400 U.S. 821, 91 S. Ct. 742, 27 L. Ed. 2d 49 (1970).

The court analysis centered on the fact that a benefit was being reaped by co-defendant Mangurian each time rent was paid on the recreational base (the tied product).

The Ninth Circuit has also adopted this "benefit view" in *Twin City Sport Service, Inc.* v. *Charles O. Finley & Co.,* 512 F2d 1264 (CA 9 1975) rev'g and remanding on other grounds, 365 F. Supp. 235 (N.D. Cal. 1972). In an action for breach of contract the defendant counterclaimed charging that the purchase of concession services for his baseball team was illegally tied to extension of credit to Finley's predecessor owner. The plaintiff raised

the statute of limitations saying that Finley's cause of action was not filed within four years of the last damaging act—the 1954 extension of the contract to its 33 year duration in 1954. Continuing harm existed in the continuing requirement to purchase concession service from the plaintiff *Ibid.* at 1270; see *Imperial Towers,* supra at 1039.

This is not the situation with the case at bar. The plaintiff is complaining of three acts, to wit:

1. Gilman and Marks duplicated title work plaintiff alleges to have done on 53 Hamilton Street, pursuant to an illegal conspiracy or contract;
2. Gilman and Marks performed all the work on the mortgage on 53 Hamilton Street, pursuant to an illegal conspiracy or contract at a minimum fee price, and
3. Gilman and Marks wrongfully interpreted the mortgage terms contrary to Connecticut General Statutes 49-3.

Plaintiff alleges an illegal tying arrangement (n.b. his discussion at pages 5-6 of his Appeals Brief). The "tying product" is apparently the mortgage commitment of Mechanics Savings Bank, while the "tied product" is the purchase of title search and mortgage preparation service of Gilman and Marks. Defendant Bailey in his affidavit (Exhibit C of Gilman and Marks' Motion for Summary Judgment) states that his firm received notification of the proposed Tucker mortgage on January 24, 1969. Title work was performed and finished by May 16, 1969, the date that the mortgage deed and note, and other papers were executed (Exhibit B of Gilman and Marks Motion). Payment was made shortly thereafter. Whatever actionable wrong might have existed in regard to this work or the fee charged, the act by its very nature was permanent and complete as of that time. No "benefit" accrued to Gilman and Marks after this time; no continuing harm incurred.

Since the plaintiff did not file his complaint until November 5, 1975, the plaintiff's cause of action as to the title work and fee charged must fail as being effectively barred by 15 U.S.C. 15b and Connecticut General Statutes 35-40.

The above propositions are equally applicable and germaine to the plaintiff's allegations concerning the mortgage preparation. The mortgage was completed and signed by the plaintiff and Mechanics Savings Bank on May 16, 1969. The expense for the preparation of this document was paid for on May 20, 1969. The relationship between plaintiff and defendant was at an end. Thus, this part of the plaintiff's complaint must likewise fail as being barred by the statute of limitations.

The final allegation posed by the plaintiff concerning a "wrongful interpretation" of mortgage provisions and the statutes of Connecticut must fail for similar reasons. Whatever "interpretation" and opinion Gilman and Marks made in regard to the final release of $12,800 was made by June 15, 1970 (the final date set in the mortgage deed for the mortgagor's obligations to be met in order to trigger the release of these monies). Whether the advice transmitted to Mechanics Savings Bank, its client, was correct, the fact remains that it was a completed act as of June 15, 1970. In other words, the legal opinion rendered by Gilman and Marks was by its "nature permanent at initiation without further acts." *Poster,* supra at 126.

Plaintiff cannot contend that each subsequent reliance by Mechanics Savings Bank on said legal opinion in June of 1970 established a new cause of action upon which he may sue, the statute of limitation notwithstanding.[2] That is,

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[2] In fact it is impossible to determine how this "wrongful interpretation" charge fits into plaintiff's monopoly charges. It is not expounded upon in either of plaintiff's briefs. More importantly, plaintiff, himself, has dismissed such in answers to in-

(footnote continued on following page)

the sudden renewal of the demand for release of the $12,800 in September of 1975 (see plaintiff's Answer #25; page R-13) in anticipation of the present lawsuit will not start the action running anew. The opinion of Gilman and Marks was "final" as a completed act by June 15, 1970. No further work was done on this mortgage after this date; the title work was done, the mortgage papers finished and a legal opinion rendered on same by June 15, 1970. To hold that each "reliance" on a legal opinion by Mechanics after a later demand by the plaintiff starts the statute to run anew against Gilman and Marks would render the statute a nullity.

C. Plaintiff's "fraudulent concealment" claims are without merit and improperly raised.

Plaintiff has raised, in pages 12-13 of his Brief, the argument that the statute should be tolled due to the fraudulent concealment of his cause of action. Plaintiff states that an "opinion" was secretly issued by Thomas Bailey to Mechanics Savings Bank that prevented release of the final mortgage funds (see page 12 of plaintiff's brief).

Merely "intoning" fraudulent concealment is not sufficient to avoid the statute. *Charlotte Telecasters* v. *Jefferson-Pilot Corporation,* 546 F2d 570 (CA 4 1977). There must exist fraudulent concealment by the party raising the statute, together with the other party's failure to discover the facts which are the basis of his cause of action, despite exercise of due diligence on his part. *Holmes* v. *Armbrect,* 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946). These matters should be distinctly pleaded alleging the particular act of fraud or misrepresentation and how, when and in

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(footnote continued from preceding page)

terrogatories. At Answer, page Q-2 when asked "4. Explain specifically in what way each act or ommission by defendant Gilman and Marks violates title 15 of the U.S. Code" plaintiff Tucker answers minimum fee rates, duplicating costs and illegal "tie-in" of services to mortgage. No mention is made of the "wrongful interpretation".

what manner they were carried out. *Stearns* v. *Page*, 48 U.S. (7 How.) 818, 829, 12 L.Ed. 928 (1849).

Not only are these requisites not met by plaintiff's Complaint (or Amended Complaint), but plaintiff's own record belies the sweeping accusations contained in his Brief.

Plaintiff leads one to believe in his Brief, at page 12, that the receipt of the Johnson (Affidavit, page K-1) and Bailey (Exhibit C of Gilman and Marks Motion) affidavits was the first knowledge the plaintiff had of why the final mortgage monies were not released and the first time he was cognizant of the substance of that opinion. However, in his Complaint dated November 5, 1975 plaintiff states at paragraph 14

> That plaintiff complied with all the requirements of the mortgage and demanded release of the morgage (sic) moneys, but the defendant, GILMAN AND MAKRS (sic), pursuant to said illegal conspiracy and contract and in consideration of the monopoly of legal work on this mortgage "interpreted" the mortgage terms contrary to the General Statutes of Connecticut and and (sic) *refused* to release $12,800 of the mortgage moneys . . . (emphasis supplied).

In Answer 3(5), dated March 22, 1976, to the interrogatories of defendant Gilman and Marks (Answer, page Q-2) when stating each act or omission performed by Gilman and Marks of which plaintiff complains, plaintiff answered, inter alia, "Defendants refused or caused Mechanics Savings Bank to refuse to make mortgage releases on grounds contrary to the General Statutes of Connecticut.

In fact, plaintiff was well aware of the substance of said opinion (see Answer 8, dated March 22, 1976 to the interrogatories of defendant Gilman and Marks, page Q-3 of the "Joint Appendix").

These various recitations were made well in advance of the late April 1976 receipt of the Bailey and Johnson affidavits. Therefore, this portion of the plaintiff's Brief is without merit.

IV. Summary and Conclusions

Co-defendant Gilman and Marks had, via its partner, Thomas Bailey, performed title and mortgage services for its client, Mechanics Savings Bank. Said work was in regard to property owned by plaintiff Tucker. All services were, at the very latest, performed by June 15, 1970. The work done in respect to the Tucker mortgage was completed, finished and paid for. No anti-trust action may be maintained some five and one-half (5½) years later.

The opinion and judgment of Judge M. Joseph Blumenfeld must be affirmed.

Respectfully submitted,

APPELLEES: George M. Gilman, Jr.,
Albert J. Marks, Jr.,
doing business as Gilman
and Marks, and Thomas
A. Bailey

By .....
PETER C. SCHWARTZ
Their Attorney

(61934)

UNITED STATES COURT OF APPEALS
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v.

MECHANICS SAVINGS BANK, GEORGE M. GILMAN, JR., ALBERT J. MARKS, JR., d/b/a GILMAN & MARKS, and THOMAS A. BAILEY,

Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 12th day of September, 1977, he served two copies of the Brief of Gilman, et al., on Stanley V. Tucker, Esq. and Thomas F. Parker, Esq., the Appellant, pro se and the attorney for Appellee Mechanics Savings Bank, respectively

~~the attorney~~ xxx ~~for the~~ xx

by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. P. O. Box 35, Hartford, Connecticut ( ) N. Y., 799 Main Street, Hartford, Connecticut, respectively that being the address designated by them for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
12th day of September, 1977.

Courtney J. Brown
COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978